**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| **CONSOLIDATED COMMUNICATIONS HOLDINGS, INC. d/b/a CONSOLIDATED COMMUNICATIONS OF TEXAS COMPANY** | § | **CASES** | **16-CA-187792** **16-CA-192050** |
| **Respondent,** | § | | |
| **and** | § | | |
| **COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,** | § | | |
| **Charging Party.** | § | | |

**CHARGING PARTY COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO'S REPLY TO RESPONDENT CONSOLIDATED COMMUNICATIONS HOLDINGS, INC. d/b/a CONSOLIDATED COMMUNICATIONS OF TEXAS COMPANY'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**
**JUDGE**

COMES NOW Charging Party Communications Workers of America, AFL-CIO ("CWA" or "Charging Party" or "the Union") and files pursuant to Rules §§ 102.2(a) and 102.46 of the Rules and Regulations of the National Labor Relations Board ("the Board" or "NLRB"), 29 C.F.R. §§ 102.2(a), 102.46, this Reply to the Answering Brief filed by on November 9, 2017 by Respondent Consolidated Communications Holdings, Inc. d/b/a Consolidated Communications of Texas Company ("Consolidated" or "Respondent" or "the Company"), and would respectfully show the following:

*I.* *The October 13, 2016 demonstration was not barred by the labor agreement's no strike provision*

Respondent argues in its answering brief that the conduct of discriminatee Kim Thompson amounted to a strike or work slowdown in violation of the labor agreement's no strike/no lockout provision. (Respondent's Answering Brief ("Brief"), pp. 6-8). This position is wrong because

there is no evidence in the record that the participants in the demonstration intended to withhold their labor. The demonstration on October 13th consisted, as Thompson testified, of five to six employees who stood in their cubicles and stretched; Thompson specifically described the demonstrators by stating employees "Just stood up, as if you would stand up and stretch from sitting all day." (Transcript ("Tr.") 33). Her testimony, along with the photographs that she and a coworker took of the demonstration (GC 2), support the analogous finding by the Administrative Law Judge. (ALJ decision of September 28, 2017 ("ALJ"), p. 2).

Employees do not have continuous calls throughout the workday; there are breaks between calls. (Tr. 74). Employees, as testified to by Respondent's Call Center Supervisor Diona Kelley, are permitted to stand and stretch in Respondent's call center where the demonstration occurred. (Tr. 86). Employees are not penalized if they are a few minutes late and can use the restroom whenever they see fit. (Tr. 59). This testimony was corroborated by call center employee Kristi Lindsey. (Tr. 76). Participation in the demonstration did not require employees to cease working in a manner that disrupted Respondent's operations. This fact is corroborated by Lindsey's testimony that she ceased participating and resumed taking calls approximately thirty to forty-five seconds into the demonstration because calls came through to her. (Tr. 66-67).

Thompson testified that she worked while standing (Tr. 33), but stopped working for the time she was taking pictures. (Tr. 47). These facts, combined with the absence of evidence in the record that work went unperformed during the demonstration, support the ALJ's finding that "Thompson . . . averred that the demonstration had only a minor effect on productivity." (ALJ, p. 3). Arguably, there is in fact no evidence of any level of disruption caused by the demonstration. Further, had such disruption occurred, it would be Respondent's burden to plead and prove such an impact. *Engelhard Corp. v. NLRB*, 474 F.3d 374, 379, n. 2 (3d Cir. 2006) (citing *Mastro*

*Plastics Corp. v. NLRB*, 350 U.S. 270, 277 (1956) for the proposition that a work stoppage in violation of a labor agreement is an affirmative defense that must be established by the employer). Respondent had the burden to prove any actual loss of production. *Engelhard Corp.*, 342 NLRB 46, 47, n. 6 (2004).

Respondent failed to meet this burden, and the quantum of evidence in this case is that no such loss of production occurred. Its only evidence of any stoppage was provided by the testimony of Director of Customer Care Kari Juri, who did not witness the demonstration because she is based in Minnesota, but none the less offered conclusory, speculative testimony that customer service was impaired and customers could not work standing because of their headsets and desks. (Tr. 95-96, 98).

Evidence from Union witnesses provided actual facts to support the conclusion reached by the ALJ that work at the call center was not impaired by the demonstration. Thompson testified that her coworkers wore headsets that had a cord or were wireless, but that those with a cord were long enough to allow representatives to walk to the printer they used. (Tr. 34-35). The Union had requested employees demonstrate between calls. (Tr. 66). Lindsey resumed working once she received calls. (Tr. 66-67). Thompson worked during the demonstration as well, but only stopped working while taking pictures. (Tr. 33, 47). This conduct by Thompson however is *de minimis*, however, by the standard of *Engelhard Corp*., where the employer "was <u>short by only six or seven employees for one shift</u>, and most of those absences were not related to the picketing." *Engelhard Corp.*, 342 NLRB at 47, n. 6 (emphasis added). It is not plausible to conclude that the brief demonstration created missed work equivalent losing even a minority of six or seven employees from one shift. Therefore the evidence in the record supports finding no disruption of Respondent's work as a result of the demonstration.

The NLRB has long held that intent to cause a work stoppage is an element of conduct in violation of a no strike clause. *Cowin and Co., Inc.* 322 NLRB 1091, 1092 (1997) (holding discipline legitimate where employee knew from past experience that displaying a picket sign would cause a strike and "By engaging in this conduct Snow intended to, and did, instigate an unprotected work stoppage."); citing *Midwest Precision Castings Co.*, 244 NLRB 597, 599 (1979) (holding employer did not violate the Act by disciplining union steward where the record was clear that a slowdown had in fact been urged by a union steward); *Chrysler Corp.*, 232 NLRB 466, 470 (1977) (finding a work stoppage in violation of a labor agreement where employees congregated at a bar near their workplace during their shift and a subsequent "sick-out" occurred."); see also *District 17, UMW v. Island Creek Coal Co.*, 179 F.3d 133, 140 (4th Cir. 1999); (finding pretextual a union's claim that a picket was informational where it was determined employees knew their conduct would result in a work stoppage).

In this case there was no fact-finding by the ALJ and no evidence in the record of this case to support finding of intent on the part of Thompson to cause a work stoppage or that such a stoppage resulted. Lindsey, in fact, testified that the Union had requested she demonstrate between calls. (Tr. 66). While the Union had, as Kelley testified, previously picketed at the call center, (Tr. 90-91), demonstrations such as October 13th's stand in support of the Union had not occurred previously at the call center. (Tr. 73). Therefore Thompson lacked precedent to draw on as to whether a work stoppage would result or Respondent would characterize such conduct as a work stoppage, which is distinct from the facts of *Corwin* and *District 17*, where the union officials in those cases knew from their respective past experiences their actions would result in a work stoppage. Similarly, there is no finding or evidence that Thompson explicitly asked employees to engage in a work slowdown or stoppage. She just asked them to stand for their Union.

Respondent at no point during the demonstration warned employees that their stretching at 2 p.m. was a work stoppage in violation of the labor agreement or otherwise ordered the participants to return to work. This failure on the part of Respondent is significant because Thompson could also not be expected to conclude that a work stoppage would be the natural result of her request for employees to participate in the demonstration. Thompson did not ask employees to not report to work, call in sick, or walk off the job. She asked then to stand and stretch at 2 p.m. on October 13th. The minute or two that employees spent stretching was consistent with activities they were normally permitted to do at work. (Tr. 86).

The conduct of employees cannot become subject to discipline because it was performed in concert because disciplining employees for the Section 7 aspect of their activity, its concerted nature, would amount to a violation of Section 8(a)(1) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1). *Holling Press, Inc.*, 343 NLRB 301, 302 (2004). Additionally or in the alternative, such action by an employer would constitute discriminatory or retaliatory conduct that would violate Section 8(a)(3), 29 U.S.C. § 158(a)(3). *NLRB v. Thermon Heat Tracing Servs.*, 143 F.3d 181, 186-87 (5th Cir. 1998). Thompson and her coworkers did not engage in an unprotected work stoppage on October 13, 2016 because such an intent cannot inferred or otherwise concluded from her and their actions. Additionally, the record is void of evidence of missed calls, excessive hold times or other indicia that production was impaired. The demonstration therefore did not violate the no strike clause and the resulting discipline imposed on Thompson violated Sections 8(a)(1) and 8(a)(3) of the Act.

*II.* *The Union did not waive through the no strike clause the right to engage in conduct such as the October 13th demonstration*

Waiver of statutory rights through a contractual provision such as a no strike cluase must be clear and unambiguous. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

Respondent argues that the service interruption or no strike provision waives the rights of employees to engage in conduct like the demonstration. (Brief, 8-10). The no strike provision is triggered by an interruption of service. (Joint Exhibit ("JX') 1, p. 8). In this regard, the contract's bar against strikes is analogous to that of the contract at issue in *Engelhard Corp.*, where the Board held that the presence of language concerning the "suspension of work" in a no strike clause meant that the clause did not "foreclose picketing that did *not* involve a suspension of work." *Engelhard Corp.* 342 NLRB at 48.

In that case, as in this case presently before the Board, no extrinsic evidence of the meaning of the contract was introduced, so "Therefore, the only evidence of the parties' intent is the language of [the] article . . . itself." *Engelhard Corp.* at 48. The Board found that the picketing of the shareholders' meeting in that case "could not reasonably be expected to (and in fact did not) lead to the suspension of any work at the Respondent's plant over 70 miles away in Peekskill, New York." *Id.* at 47. Put simply, the picket at the shareholders' meeting did not result in a loss of work, even though some employees missed work to participate in the picket. *Id.*, n. 6. The Board also noted that it was the employer's burden to establish that a loss of production had occurred. *Id*. (stating "We agree with the judge that the Respondent has failed to establish that the events of May 4 caused a loss of production."). Therefore, the shareholder strike at issue in *Engelhard Corp.* was not prohibited by the applicable labor agreement.

Respondent asks in its brief that the Board give the same overbroad and unreasonable reading of the no strike clause in this case that it declined to give in *Engelhard Corp*. Such a reading is untenable here as it was in *Engelhard Corp.* because the no strike provision in the contract between the Union and Respondent is triggered by an interruption of service. As recounted above, the ALJ did not find and Respondent failed to prove that such an interruption

resulted from the demonstration. This analogous to the finding in *Engelhard* that informational picket did not run afoul of a no strike provision triggered by suspension of work where no such suspension occurred. As such, the no strike clause did not bar the October 13th demonstration.

*III.* *Conclusion and prayer*

Charging Party Communications Workers of America, AFL-CIO urges the National Labor Relations Board to sustain its exceptions to the ruling of the ALJ and the exceptions of the Counsel for the General Counsel and hold Respondent Consolidated Communications Holdings, Inc. d/b/a Consolidated Communications of Texas Company to have violated the National Labor Relations Act as alleged in the live pleading in this case.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served on Counsel for the General Counsel and Counsel for Respondent by electronic mail on this 24th day of November 2017:

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